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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 756

MARGARET B. CARPENTER AND LEROY E. CARPENTER,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF AND MOTION FOR LEAVE TO REFER TO RECORD IN OTHER PROCEEDING IN THIS COURT.

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LEO GALLAGHER,
GROVER JOHNSON,
Of Counsel.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	1
Reason relied on for allowance of the writ	5
Brief in support of petition for writ of certiorari	7
Opinions of the courts below	7
Jurisdiction	8
Statement of the case	9
Specification of errors	14
Summary of argument	14
Argument	16
Point 1	16
2	18
3	19
4	21
Conclusion	23
Motion for leave to refer to record in case of *Carpenter* v. *Hamilton*, No. 93 October Term, 1940	27

Table of Cases Cited.

Allstead v. *Laumeister*, 16 Cal. App. 559	22
Bedford Cut Stone Co. v. *Journeymen Stone Cutters Association*, 274 U. S. 37	24
Birchetto v. *Raney*, 76 Cal. App. 232	11
Brandt v. *Krogh*, 14 Cal. App. 39	22
Bridges v. *Superior Court*, 98 Cal. Dec. 407	2
Carpenter v. *Hamilton*, 13 Cal. App. (2d) 69	7
Chambers v. *Florida*, 308 U. S. 541	18
DeWeese v. *Reinhard*, 165 U. S. 386	21
Fortenbury v. *Superior Court*, 104 Cal. Dec. 407	2
Frank v. *Mangum*, 237 U. S. 309	18
Georgia Railway and Electric Company v. *City of Decatur*, 295 U. S. 165	18
Hamilton v. *Carpenter*, 99 Cal. Dec. 129	7
Hansberry v. *Lee*, — U. S. —, No. 29, October Term, 1940	9

Page

Herndon v. *Georgia*, 295 U. S. 441 2
Herndon v. *Lowrey*, 301 U. S. 242 2
Kreamer v. *Earl*, 91 Cal. 112 22
Larson v. *Northland Transportation Company*, 292 U. S. 20 19
Lillis v. *Immigrant Ditch Co.*, 95 Cal. App. 533 20
McClatchey v. *Superior Court*, 119 Cal. 413 2
McComb v. *Frink*, 149 U. S. 629 19
McCormick v. *Gross*, 135 Cal. 304 20
Mooney v. *Holohan*, 294 U. S. 103 5
Moore v. *Dempsey*, 261 U. S. 86 18
Nardone v. *United States*, 302 U. S. 379 23
Norris v. *Alabama*, 294 U. S. 587 17
Olmstead v. *United States*, 277 U. S. 438 23
Palko v. *Connecticut*, 302 U. S. 219 24
Pierre v. *Louisiana*, 306 U. S. 354 17
Powell v. *Alabama*, 287 U. S. 45 24
Richman v. *Bank of Perris*, 102 Cal. App. 71 23
Saunders v. *Shaw*, 244 U. S. 317 18
Sprague v. *Ticonic National Bank*, 307 U. S. 161 23
Stephan v. *Superior Court*, 183 Cal. 673 11
Thornhill v. *Alabama*, 308 U. S. 547 24
U. S. Shoe Machinery v. *United States*, 258 U. S. 451 17
Virginia-Carolina Chemical Co. v. *Kirven*, 215 U. S. 252 19
White v. *Texas*, 300 U. S. 631 2

STATUTES CITED.

California Civil Code:
Sec. 2924 12
2924 a 12
2929 c 12
California Code of Civil Procedure, Sec. 580 c 12
Constitution of the United States, Fourteenth Amendment 8
Judicial Code, Sec. 237b, as amended by Act of February 13, 1925, 43 Stat. 937 8

TEXT BOOKS CITED.

4 Calif. Jurisprudence, p. 1022 2
10 Calif. Jurisprudence, p. 515 22

SUPREME COURT OF THE UNITED STATES

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vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

PETITION FOR WRIT OF CERTIORARI.

Your petitioners, Margaret B. Carpenter and Leroy E. Carpenter, respectfully allege:

A.

Summary Statement of Matter Involved.

The petitioners are citizens of the United States, and defendants in a suit in equity brought in the Superior Court of Los Angeles County to foreclose a certain trust deed with respect to certain real property purchased by the peti-

tioners from the plaintiff in that action, Archibald J. Hamilton.[1]

Prior to the commencement of said equitable suit,[2] petitioners had instituted an action in said Superior Court against Hamilton to recover damages for fraudulent representations alleged to have been made to them by said Hamilton in the course of the sale to petitioners of said property.

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[1] The litigation between the petitioners and Hamilton has been before this Court in *Carpenter* v. *Hamilton*, October term, 1940, No. 93. This court, in denying certiorari without opinion (October 21, 1940), did not foreclose itself from considering the merits of the claims of the petitioners, as set forth in the instant petition.

In opposition to the Petition in No. 93, the respondent asserted that a Federal question had not been adequately raised by the petitioners in the then proceedings in the California courts. (Brief of Respondents in Opposition to Petition for Writ of Certiorari, p. 7.) Under the California State practice and law, a judgment void or unauthorized because of denial of a constitutional right may be challenged by a "petition for writ of certiorari" (or review), in the State courts, and may be annulled by the issuance of a writ thereon. (*Fortenbury* v. *Superior Court*, 104 Cal. Dec. 407, decided October 14, 1940); *Cf. Bridges* v. *Superior Court*, 98 Cal. Dec. 341, 354, reprinted at R. 136, 152, in No. 19, October Term, 1940. Under the California law, moreover, the denial of a "constitutional right to be heard in his defense" renders a judgment void. (*McClatchey* v. *Superior Court*, 119 Cal. 413, 416.) As will appear later, this is the precise claim asserted by the petitioners in the instant petition.

On November 15, 1940, petitioners filed with the Supreme Court of California a petition for writ of certiorari, in accordance with the California practice above adverted to (R. 1). On November 25, 1940, the California Supreme Court, without opinion, denied the petition (R. 6). In that petition the petitioners expressly challenged the judgment of the Los Angeles Superior Court against them, decreeing foreclosure of their home, as a deprivation of "property without due process of law as guaranteed to the petitioners by the Fourteenth Amendment to the Constitution of the United States and by Article I, Section 13 of the California Constitution" (R. 4).

The history of the above litigation is not unlike that involving Angelo Herndon, in the course of which this Court first (*Herndon* v. *Georgia*, 295 U. S. 441), dismissed an appeal for want of the proper raising of a Federal question; and, later (*Herndon* v. *Lowrey*, 301 U. S. 242), upon the filing of a petition for writ of *habeas corpus* in the Georgia trial court, allowed an appeal in the *habeas corpus* proceedings, upon the proper raising of the Federal issue, and then voided the original judgment of conviction.

Under the California practice the scope of inquiry on certiorari (or review) and *habeas corpus* is the same. 4 Calif. Jurisprudence, p. 1022.

The trial of said action was by jury and a verdict was rendered in favor of petitioners. Hamilton then moved for judgment notwithstanding the verdict, which motion was denied. Thereafter Hamilton moved for a new trial and it was granted. Without intervening action, Hamilton then appealed from the order denying his said motion for judgment notwithstanding the verdict, to the Second District Court of Appeals of California. Judgment for petitioners was reversed by that Appellate Court and the cause remanded with directions to the said Superior Court to enter judgment notwithstanding the verdict, in favor of said Hamilton,[3] which judgment was accordingly entered. The order for a new trial as to all the issues was not set aside, but was affirmed by that Appellate Court in the same decision (R. 45).

In the foreclosure proceeding petitioners interposed an answer to plaintiff Hamilton's complaint setting out as an affirmative defense that certain false and fraudulent representations were made by Hamilton to the petitioners, in the course of the sale of the property;[4] and in effect that

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The attention of the Court is further called to *White* v. *Texas*, Certiorari denied, 308 U. S. 608; Petition for Re-hearing granted, and judgment reversed, 309 U. S. 631, and respondent's Petition for Re-hearing denied, 310 U. S. 530.

[2] The facts are set forth in more complete detail in the Transcript of Record in No. 93. That Record will be hereinafter referred to, and all references will be to that Record unless otherwise indicated.

[3] The opinion of the District Court of Appeal is reported in *Carpenter* v. *Hamilton*, 13 Cal. App. (2d) 69, and reprinted in R. 38, in No. 92, October term, 1940.

[4] The precise representations, and the particular manner in which they were false and fraudulent are set forth in petitioners' third separate defense in the petitioners' answer to plaintiff Hamilton's complaint, and appear at R. 10, in No. 93, *supra*. These representations are adequately summarized by the District Court of Appeals (at R. 38, in No. 93):

> "Plaintiffs (petitioners) testified * to the following principal representations, which they claim to have believed and relied upon in making purchase of a residence located in the city of Los Angeles; that the house and garage buildings were in good condition and were

the plaintiff, a suitor in a court of equity, was guilty of unclean hands because of the misrepresentations made by him; and hence barred from relief in a court of equity and good conscience.

At the trial of said foreclosure proceeding the court admitted into evidence the judgment roll in the previous action for damages for fraud (R. 27) and denied petitioners' proffer of proof that the plaintiff had been guilty of fraud as set forth in their said affirmative defense (R. 27, 28). Said denial was upon the ground that the matters sought to be introduced in evidence had been previously adjudicated in the former common law action for damages for fraud (R. 28).

Judgment of foreclosure was thereupon entered against petitioners and in favor of said Hamilton (R. 23). An appeal from said judgment was taken by petitioners to the Supreme Court of California and the said court affirmed said judgment.[5]

The federal constitutional question raised by this petition for a writ of certiorari is whether the petitioners have

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not in need of paint or repair work of any kind; that the walls were in good condition; that the floors were absolutely level; that the house had a new roof of redwood shingles, and that the garage also had a new roof. Other statements made were mere expressions of opinion and need not be enumerated. The evidence disclosed that the floors were not level; that the foundation on three sides of the house had sunk, causing a sinking of portions of the floors in the dining room, breakfast room, play room, maid's room and garage, as well as numerous cracks in the plaster on the walls. The roof of the house was not new but had been patched with tin shingles, and the garage roof was not new. There were other defects which it is unnecessary to particularize."

* This refers to the first suit, *Carpenter* v. *Hamilton*. In the second proceeding, which resulted in a judgment against the petitioners which the petitioners challenge in the instant proceedings, the petitioners were not permitted to introduce any such evidence. And that is the burden of petitioners' grievance.

[5] The opinion of the Supreme Court of California is reported in 99 Cal. Dec. 129 and set forth at R. 46, in No. 93.

been deprived of their property without due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

More precisely the question is whether the refusal of the trial court (which refusal was affirmed by the Supreme Court of California) to allow the introduction of evidence, proffered by the petitioners, to the effect that the plaintiff in said equitable action was guilty of misrepresentation and fraud, and hence of "unclean hands," constitutes a denial, in effect, of a hearing, and, accordingly, a deprivation of property without due process of law.

The rejection of such evidence by the California courts was pursuant to their construction of, and application by them of the doctrine of *res adjudicata*.

Whether the misapplication of the doctrine of *res adjudicata* by the California courts, as claimed by the petitioners, is such as to abridge "the rudimentary demands of justice",[6] and hence offend against Federal due process is the Federal constitutional issue posed by the instant petition.[7]

B.

Reason Relied on for Allowance of Writ.

The refusal of the California courts to permit the petitioners to assert and prove their defense to the action, namely, that Hamilton, the plaintiff in said action, had made false and fraudulent representations in the course of the sale of the property to the petitioners, and hence was guilty of "unclean hands", constituted, in effect, a denial to the petitioners of a right to a hearing; and thus, in turn, an abridgment of Federal due process. The judgment of foreclosure by the California courts, taking their home away

[6] From *Mooney* v. *Holohan* (1934), 294 U. S. 103.

[7] *Cf. Hansberry* v. *Lee*, Oct. term, 1940, November 12, 1940, 310 U. S. —.

from the petitioners, under the circumstances indicated, constitutes a deprivation of the property of the petitioners, without such due process.

Nor does the repetition of the phrase *res adjudicata* by the State courts below, as the justification for the denial of that right to a hearing required by due process, meet the requirements of the Federal Constitution.

When the doctrine of *res adjudicata* is applied by a State court, and is interposed as a defense to a claim that the State court judgment violates Federal constitutional rights, this Court will review the course of procedure in the State courts in order to determine whether such course squares with the basic concepts of Federal due process.[8]

Such a review,[9] we believe, will bring this Court to the conclusion that the judgment below is at fatal variance from the requirements of Federal due process.

WHEREFORE, petitioners pray that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of California.

MARGARET CARPENTER AND
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[8] *Cf. Hansberry* v. *Lee, supra.*

[9] The course of proceedings in the State courts below will be reviewed in petitioners' Brief in Support of Petition for Writ of Certiorari, *infra*, p. 9.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 756

MARGARET B. CARPENTER AND LEROY E. CARPENTER,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The judgment of the Supreme Court of California denying the petitioners' Petition for a Writ of Certiorari (or review) was entered without opinion.[10] Pertinent decisions are:

Hamilton v. *Carpenter,* Supreme Court of California, 99 Cal. Dec. 129, set forth at R. 46 in No. 93, Oct. Term, 1940;

Carpenter v. *Hamilton,* 13 Cal. App. (2d) 69, set forth at R. 38 in No. 93, *supra.*

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[10] R. 4, in instant case.

II.

Jurisdiction.

1. Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of this Court is invoked under Judicial Code, Sec. 237b, as amended by Act of February 13, 1925, 43 Statutes 937.

2. Finality of Judgment.

The judgment forming the basis of the petition is final both in form and substance and disposes of all the elements of controversy in the court below.

3. Petition Timely Filed.

The judgment of the Supreme Court, sought to be reviewed herein, was entered November 25, 1940 (R. 4).

4. Judgment of the Highest State Court.

The Supreme Court of the State of California is the court of last resort in California.

5. Federal Question, Timely, Properly and Adequately Raised.

The petitioners, in their "Petition for Writ of Certiorari" to the Supreme Court of California, asserted the claim that the judgment of the Los Angeles Superior Court decreeing foreclosure of the petitioners' home constituted a deprivation of their "property without due process of law as guaranteed to the petitioners by the Fourteenth Amendment of the Constitution of the United States."[11]

This matter is discussed more fully in the Petition herein, *supra*, p. 2, footnote 1.

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[11] R. 2, in instant case.

6. Cases Sustaining Jurisdiction.

The following case, among others, sustains the jurisdiction of this court:

Hansberry v. *Lee*, No. 29, Oct. Term, 1940, decided November 12, 1940, 310 U. S. —.

III.

Statement of the Case.[12]

The first action, instituted by the petitioners, against Hamilton (*Carpenter* v. *Hamilton*) was an action at law for damages. The petitioners sought to recover damages because of the false representations made to them by Hamilton.

There were two concurrent rulings in said damage action, the judgment notwithstanding the verdict, which the District Court of Appeals ordered to be entered, and the order by the trial court for a new trial as to all the issues, which order was affirmed by that Appellate Court in the same decision (R. 45).

Of said two rulings the trial court, in the second suit, sitting in equity, disregarded the order for a new trial and selected the judgment notwithstanding the verdict, which had been entered in the proceedings of the vacated trial (R. 45), as the final judgment of the damage action, upon the judgment roll of the damage action being introduced into the foreclosure action as *res adjudicata* of the defense issue of "unclean hands" (R. 27). Said selection was affirmed by the Supreme Court (R. 48).

The final judgment below in the first cause of action denied the petitioners relief at law. It was based *not* upon a finding or adjudication that Hamilton was not guilty of the fraud charged; on the contrary, the ruling

[12] This statement is supplemental to that contained under "Summary Statement of Matter Involved", *supra*, p. 1.

and adjudication was that the petitioners (the plaintiffs in that action) had not made that thorough-going inspection of the premises which would have resulted in a discovery by them that Hamilton had committed the fraud complained of; that accordingly the petitioners, because of their *neglect* of duty to make such investigation, were not entitled to recover, in an action at law, against Hamilton. Thus the District Court of Appeals ruled:

> "Plaintiffs (petitioners) had a right to rely upon the representations made to them concerning matters of fact which were unknown to them without making any inquiry concerning the truth thereof, and had they done so defendant (Hamilton) could not *evade the consequences* of any false and fraudulent statements he may have made by showing that means of knowledge of the truth were easily available to the plaintiffs.
>
> "It is to be conceded that if they (the petitioners) had made no examination of the property defendant *could not excuse his fraud* by the plea that plaintiffs (petitioners) were negligent in believing what he said, and in failing to make an independent investigation, but having undertaken the inquiry, plaintiffs were obliged to look with seeing eyes. When the inspection was over they *could not excuse their ignorance* of what they should have seen by pleading the superficial character of their examination." [13]

It is apparent, from the foregoing, that the California courts did not exonerate Hamilton of the charge of fraud.

Indeed, its decision is founded on the premise that he was guilty of the fraudulent representations as charged by the petitioners.

The court concluded:

> "They (the petitioners) may not deny knowledge of facts which would have been known to them but for their

[13] Italics ours. All emphasis hereinafter, unless otherwise indicated, will be ours.

negligence. * * * Courts cannot be expected to extricate persons from entanglements into which they have fallen through their own *neglect* of duty."

In the second proceeding Hamilton was the complaining and hence moving party. He instituted an *action in equity* for the foreclosure of the trust deed upon the property. It was an action to procure or substitute judicial decree of sale against the land, in lieu of the trustee's sale, which he was free to pursue under the trust deed, without judicial decree. Sec. 2924, Civil Code.

He sought the aid of a court of good conscience. Although between the same parties, the second suit was based upon a *different* cause of action.

The first cause of action was at law; the second, at equity. This distinction has long been recognized in California. An action for damages for fraud is an action at law. *Stephan* v. *Superior Court*, 183 Cal. 673. A suit for foreclosure of real property is an *equitable proceeding* as distinguished from an action at law. *Birchetto* v. *Raney*, 76 Cal. App. 232.

The first cause of action was for damages; it did not involve a judicial decree of sale against the land nor the title to property. The second cause of action was not for damages; it involved a judicial decree of sale against the land and the title to property.

Action for judicial decree of sale in lieu of the trustee's sale raised the following issues as shown by the record:

1. The conversion of the principal of the trust deed with interest at 6% into a judgment with interest at 7%. (R. 3, 25);

2. The extension of the interest-bearing period to cover the time consumed in litigating the action (R. 25);

3. The award of attorney's fees in the extraordinary sum of $800.00, plus interest at 7%, upon the note as a separate instrument (R. 3, 20, 25), whereas the note and trust deed

were one instrument and the only attorney's fees provided were fees for the sale of the property, should the attorney act in lieu of the trustee in conducting the sale. Said fees were limited to an amount deemed reasonable by the court, not to exceed $25.00 in case of a trust deed nor $50.00 in case of a mortgage (Sections 2924, 2924 a, 2924 c, California Civil Code; Sec. 580 c, California Code of Civil Procedure).

4. The award of court costs in addition to costs of sale (R. 25).

It is clear from the record that all of the above issues were adjudicated in the foreclosure action and said items were added to the obligation of the trust deed and decreed against the land, with interest at 7% (R. 24, 25).

It is equally clear, upon the face of the Opinion of the District Court of Appeals (R. 38-45), that none of said issues were pleaded or adjudicated in the prior damage action.

The first cause of action—the damage action—as actually litigated, did *not* adjudicate, whether or not Hamilton was guilty of fraud. In the second cause of action—the foreclosure action—Hamilton's alleged fraud and misrepresentation were competent and indispensable issues as raised by the pleadings; evidence proffered in support thereof was equally competent and indispensable, in order to afford the petitioners a full and fair hearing.

> "A warranty is said to be such recommendations or affirmations at the time of purchase as are supposed to have induced the sale and are as much a part of the contract as any other part of the contract, and not a mere collateral understanding. There is no distinction between fraudulent representations going to induce a contract and representations in the nature of warranties. * * * The warranty is binding whether or not there is fraud." N.C.D., Vol. 21, p. 87.

In the foreclosure suit, the trial court rejected the petitioners' offer of proof to the effect that Hamilton's conduct had been fraudulent, and that Hamilton's hands were "unclean", on the ground of "*res adjudicata*". The Supreme Court of California upheld the ruling, declaring:

> "No serious consideration may be accorded the attempted invocation of the maxim that he who comes into equity must come with clean hands. A sufficient answer to the contention in this respect is that the issue of fraud, having been adjudicated favorably (in the former suit) to the plaintiff herein (Hamilton), there is no place for the application of the maxim."

This statement is essentially incorrect. The issue as to whether *Hamilton was guilty of fraud* was *not* determined in the former proceeding. The only issue litigated was that the petitioners, because of their *neglect* to conduct a complete investigation, were entitled to no damages against Hamilton, in an action at law.

The following factual and legal issues, accordingly, pertinent to the second proceeding, were *not* disposed of in the first.

1. Was Hamilton guilty of fraud or any unconscionable conduct?

2. Was that fraud or unconscionable conduct such as to bar him from relief in a court of equity and good conscience; and such as to bar him from a judicial decree of foreclosure and sale, which increased the benefits to himself and enlarged the obligation of the trustors under the trust deed?

3. Is the rejection of evidence by a State court, tending to prove such fraud or unconscionable conduct, the denial of a hearing and hence a deprivation of due process under the federal Constitution?

IV.

Specification of Errors.

The petitioners assign the following errors in the record and proceedings below:

The California courts—the Superior Court of Los Angeles County and the Supreme Court of the State of California, which affirmed the judgment of said Superior Court—erred in their decisions and judgments in the following particulars:

The judgment of the Superior Court (affirmed by the Supreme Court of California) deprives the petitioners of property without due process of law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, in that said judgment was entered without affording petitioners the right to a hearing upon a substantive defense—namely, that the plaintiff in the action against them had made false and fraudulent representations in the course of the sale of the property to them, and therefore was guilty of "unclean hands".

Said judgment abridges the petitioners' property in deprivation of federal due process, in that it is based upon a ruling that the petitioners were not entitled to assert and prove as a defense that the plaintiff was guilty of false and fraudulent representations; this ruling, in turn, was based upon a misapplication of the doctrine of "*res adjudicata*".

V.

Summary of Argument.

The judgment of the Superior Court (affirmed by the Supreme Court of California) deprives the petitioners of property without due process of law as guaranteed to

them by the Fourteenth Amendment to the Constitution of the United States, in that said judgment was entered without affording petitioners the right to a hearing upon a substantive defense—namely, that the plaintiff in the action against them had made false and fraudulent representations in the course of the sale of the property to them, and therefore was guilty of "unclean hands".

Said judgment abridged the petitioners' property in deprivation of federal due process, in that it is based upon a ruling that the petitioners were not entitled to assert and prove as a defense that the plaintiff was guilty of false and fraudulent representations; this ruling, in turn, was based upon a misapplication of the doctrine of *"res adjudicata"*.

Point 1. *This Court will review the procedure in State courts when the application by a State court of the doctrine of "res adjudicata" is challenged as an impairment of federal due process.*

Point 2. *The refusal by a State court to permit a defendant to assert and prove a substantial defense, constitutes a denial of a hearing; a judgment depriving a defendant of property based upon such a denial of a hearing, constitutes a deprivation of property without due process of law.*

Point 3. *A judgment of a State court constitutes an adjudication with respect to only those matters arising in a subsequent suit, upon a different cause of action between the same parties, as have been actually litigated in the first proceeding.*

Point 4. *The doctrine of "unclean hands" is inherent in federal due process.*

VI.

ARGUMENT.

The judgment of the Superior Court (affirmed by the Supreme Court of California) deprives the petitioners of property without due process of law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, in that said judgment was entered without affording petitioners the right to a hearing upon a substantive defense—namely, that the plaintiff in the action against them had made false and fraudulent representations in the course of the sale of the property to them, and therefore was guilty of "unclean hands".

Said judgment abridged the petitioners' property in deprivation of federal due process, in that it is based upon a ruling that the petitioners were not entitled to assert and prove as a defense that the plaintiff was guilty of false and fraudulent representations; this ruling, in turn, was based upon a misapplication of the doctrine of "*res adjudicata*".

Point 1.

1. *This Court will review the procedure in State courts when the application by a State court of the doctrine of "res adjudicata" is challenged as an impairment of federal due process.*

When a judgment of a State court is challenged because of an alleged abridgment of federal due process, and it is urged in reply, that the judgment is in accord with the local law, in that it is based upon an application by the local courts of the doctrine of "*res adjudicata*", this Court will review the course of procedure in the State courts and determine whether such course is either consistent with, or runs counter, to the minimum requirements of federal due process.

Hansberry v. *Lee, supra,* decided:

"State courts are free to attach such descriptive label to litigations before them as they may choose, and to attribute to them such consequences as they think appropriate under state constitution and laws, subject only to the requirements of the Constitution of the United States. But when a judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res adjudicata* is challenged for want of due process, it becomes the duty of this court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."

Where necessary this Court will review the evidence, when a federal right has been asserted and allegedly denied by a State Court.

Pierre v. *Louisiana,* 306 U. S. 354, 358.

"When a claim is properly asserted, * * * it becomes our solemn duty to make independent inquiry and determination of the disputed facts."

Norris v. *Alabama,* 294 U. S. 587, 590.

"That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied.

"When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect. If this requires an examination of evidence, the examination will be made."

Cf. *U. S. Shoe Machinery* v. *U. S.,* 258 U. S. 451, 459:

"In other words, to determine the effect of a former judgment pleaded as an estoppel, two questions must be answered:

(1) Was the former judgment rendered in the same cause of action?

(2) If not, was such matter litigated in the former suit determinative of the matter in controversy in the second suit?

To answer these questions we must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy."

And it is settled that due process is more than mere notice and hearing.[14]

It is now determined that any abridgment by the State Courts of the "rudimentary demands of justice" may be challenged as a denial of federal constitutional right.[15]

Point 2.

The refusal by a State court to permit a defendant to assert and prove a substantial defense, constitutes a denial of a hearing; a judgment depriving a defendant of property based upon such a denial of a hearing, constitutes a deprivation of property without due process of law.

In *Georgia Railway and Electric Company* v. *City of Decatur,* 295 U. S. 165, 171, it is decided that:

"The refusal of a (State) court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue in contravention of the due process clause of the Constitution."

Accord, opinion by Justice Holmes in *Saunders* v. *Shaw,* 244 U. S. 317, 319.

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[14] *Mooney* v. *Holohan, supra.*

[15] Compare the line of cases by this Court beginning with *Frank* v. *Mangum,* 237 U. S. 309, and *Moore* v. *Dempsey,* 261 U. S. 86, and concluding with *Chambers* v. *Florida,* 308 U. S. 541, and *White* v. *Texas, supra.*

Point 3.

A judgment of a State court constitutes an adjudication with respect to only those matters arising in a subsequent suit, upon a different cause of action between the same parties, as have been actually litigated in the first proceeding.

The law is thus summarized in a recent decision by this court:

> *Larson* v. *Northland Transportation Company*, 292 U. S. 20, 25:
>
> "The established rule in this Court is that, if, in a second action between the same parties, a claim or demand different from the one sued upon in the prior action is presented, then the judgment in the former claim is an estoppel 'only as to those matters in issue or point controverted, upon the determination of which the finding or verdict was rendered.' "

In accord is *Virginia-Carolina Chemical Company* v. *Kirven*, 215 U. S. 252, 257,

> "If the second action is upon a different claim or demand, the bar of the judgment is limited to that which was *actually* litigated and determined."

> *McComb* v. *Frink*, 149 U. S. 629, 641, is to the effect that:
>
> "In all cases where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, *the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action.*"

Until the decision of the Supreme Court of California in the instant case the above had been the California law.

Thus, in *Lillis* v. *Immigrant Ditch Co.*, 95 Cal. App. 533, 538, we find:

> "If, however, the cause of action or demand upon which the former judgment was rendered is different from the one prosecuted in the second action, it is then necessary to ascertain as a question of fact what issues or matters were determined in the former action, and then to determine as a matter of law whether those issues and their determination were essential to the former judgment; *for it is only issues* upon which that judgment depends that the parties are estopped from litigating in any other action. Matters which were merely collateral or incidental to the former determination do not constitute an estoppel, even though they were litigated and decided therein; *and the evidence which was introduced in support of such issues may always be introduced in support of a defense in any other action.* The judgment in such a case does not become an estoppel as to all matter which *might* have been litigated therein, but only as to such as were *actually litigated,* and which were necessary to be determined by the court before rendering its judgment upon the demand or defense."

The California Statute law as summarized by the Supreme Court of California, and until abrogated by the California courts in the case at bar, is to the same effect.

McCormick v. *Gross*, 135 Cal. 304:

> "It is provided in Section 1908 of the Code of Civil Procedure (of California) that 'a judgment or order in certain cases is conclusive between the parties as *'to the matter directly adjudged'*, and, in section 1911, 'that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was *actually* and *necessarily* included therein or *necessary* thereto.' "

It seems clear that the first judgment (in *Carpenter* v. *Hamilton*) as ordered by the District Court of Appeals, did

not adjudicate the issue whether or not Hamilton had perpetuated a fraud, or was guilty of unconscionable conduct. That issue was neither

(a) actually litigated, nor
(b) necessary to be determined before rendering judgment against the petitioners.

The only issue that was actually litigated, and a determination upon which was necessary in order to support the judgment in favor of Hamilton, was the *neglect* of the petitioners to make that full investigation of the premises which would have led them to a discovery of Hamilton's fraud. The petitioners' equitable defense—Hamilton's fraud, and hence his alleged "unclean hands"—were not passed upon in the former proceedings, and could not have been properly determined in the former action at law, under the law and practice of California.

Point 4.

The doctrine of "unclean hands" is inherent in federal due process.

Its rejection by the State Courts violates federal due process.

This doctrine has been summarized by this court in the *De Weese* v. *Reinhard* case, 165 U. S. 386, 390, as follows:

> "The meaning and proper application of the maxim are to be considered. As authoritatively expounded, the words and the reasons upon which it rests extend to the party seeking relief in equity. 'It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands * * *'. The governing principle is 'that whenever a party who, as actor, seeks to set the judicial machinery in motion and

> obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' Pomeroy, Equity Jurisprudence, 4th ed., Section 397. This court has declared: 'It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity.' *Bein* v. *Heath,* 6 How. 228, 247. And again: 'A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.''

For a quarter of a century, up to the instant case, the above had been the law of California.[16]

As early as 1910, the California District Court of Appeals in *Brandt* v. *Krogh,* 14 Cal. App. 39, had declared:

> "A court of equity is a court of conscience, and will under no circumstances enforce or permit to be enforced the terms of a contract founded in fraud, *even if there existed and were accessible to the defendant the means and opportunity to detect such fraud by the exercise of ordinary prudence.*"

This familiar principle the California courts refused to apply to the petitioners.

That refusal was more than mere error of law on the one hand; or misapplication of local law on the other hand. It robbed the petitioners of the right to a *hearing* in defense

[16] 10 *Calif. Jurisprudence* 515; *Allstead* v. *Laumeister,* 16 Cal. App. 559; *Kreamer* v. *Earl,* 91 Cal. 112.

of their property; it thus deprived them of the essence of due process.

Conclusion.

This Court has shown a deep concern to "retain equity as a living system and save it from sterility." [17]

At the heart of a court of equity and conscience must be the equitable concept that the fraudulent may not seek and secure the aid of a court of justice on consummating their fraud. Heretofore the above has been the law of California. The California courts had declared, prior to the case at bar:

> "A court of equity will not allow itself to become a hand-maid of inequity of any kind. It intervenes, not for the sake of the party who is benefited by the intervention, but for the sake of the law itself." [18]

That is the law of the United States.

> "The governing principle has long been settled. It is that a court will not redress a wrong when one who invokes its aid has 'unclean hands' * * * The aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes spoken of as a rule of substantive law. But it extends to matters of procedure as well. A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all parties to the litigation. The court protects itself." *Olmstead* v. *United States*, 277 U. S. 438, 471.[19]

[17] Justice Frankfurter in *Sprague* v. *Ticonic National Bank, et al.*, 307 U. S. 161, 167.

[18] *Richman* v. *Bank of Perris*, 102 Cal. App. 71.

[19] Justice Brandeis' great dissent became the law of the land, when Mr. Justice Frankfurter spoke for this Court in *Nardone* v. *U. S.*, 302 U. S. 379; 308 U. S. 338.

The equitable concept of "unclean hands"—that the courts will protect themselves from the fraudulent and unconscionable—should be held by this Court to apply to all the courts of the nation—state as well as federal. The principle must be held to inhere in federal due process. For this Court to permit the state courts to abrogate this ancient and fundamental precept, and to refuse to apply it, is to sanction the sacrifice of elementary and essential justice.[20]

This court has heretofore adequately protected the property rights of "capitalist"[21] corporate wealth. In recent years it has afforded zealous protection to the personal liberties of the worker,[22] the poor,[23] and the defenseless.[24]

The petitioners are at neither end of the social pyramid. They are members of the "middle class," fighting in the courts for *their* property—and said property is their home.[25]

In the California courts, the petitioners were not accorded their "day in court." They were denied the right to a hearing. That denial, they assert, constituted a deprivation of their property at variance with federal due process.

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[20] *Cf.* Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 219.

[21] The phrase is that of Justice Brandeis, dissenting in *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Association*, 274 U. S. 37, 56.

[22] *Thornhill* v. *Alabama*, 308 U. S. 547.

[23] *Chambers* v. *Florida*, 308 U. S. 541, and *White* v. *Texas*, *supra*.

[24] *Powell* v. *Alabama*, 287 U. S. 45, and *Johnston* v. *Zerbst*, 304 U. S. 458.

[25] The Supreme Court of California, in the instant case reversed the California law. Its decision, if allowed to remain in the law books unchallenged and unreversed, will justify the following paraphrasing of Pitt: "A free man's home is his castle. Neither the King nor the Sovereign may enter it. But that which neither of them may do, the fraudulent and unconscionable may; they may not only enter the free man's home; they may take it away from him—and they may convert a court of equity and conscience, into their ready hand-maiden, to consummate their fraud."

Petitioners pray that the wide ambit of the due process of the federal Constitution, which has heretofore protected both the rich and the poor, will be held by this Court to protect them also.

Respectfully submitted,

A. L. WIRIN,
Attorney for Petitioners.

LEO GALLAGHER,
GROVER JOHNSON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 756

MARGARET B. CARPENTER AND LEROY E. CARPENTER,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

MOTION FOR LEAVE TO REFER TO RECORD IN OTHER PROCEEDING IN THIS COURT.

Come now the petitioners, by their attorney A. L. Wirin, and move the court for an order granting leave to the petitioners to refer, in their petition for a writ of certiorari, to the record in the case of *Carpenter, et al.*, v. *Hamilton*, No. 93, October Term, 1940.

The grounds for said motion are that said record, heretofore printed and on file with the clerk of this Court, contains matter material to the instant petition.

Said record may be conveniently referred to by the court without a requirement by the court that the petitioners reprint same.

A. L. WIRIN,
Attorney for Petitioners.

Dated February 3, 1941.

Office - Supreme Court, U. S.
FILED
MAR 28 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 756

MARGARET B. CARPENTER AND LEROY E. CARPENTER,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

PETITIONERS' REPLY BRIEF ON PETITION FOR CERTIORARI.

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Counsel for Petitioners.

LEO GALLAGHER,
GROVER JOHNSON,
Of Counsel.

INDEX.

Subject Index.

Page

I. The petition for writ of certiorari filed by the petitioners in the Supreme Court of California was the appropriate procedure, under the law and practice of California, properly, adequately and timely to assert the denial of federal due process 1

II. The California courts never have adjudicated that Hamilton was not guilty of fraudulent representations. Respondent's assertion that: "The necessary effect of the final judgment in Hamilton's favor was that he did not make them" (the fraudulent representations) is untrue. 5

Table of Cases Cited.

Abelleira v. *District Court of Appeal*, 2 Cal. Dec. 254, 109 P. (2d) 945 2

Bennett v. *Wilson*, 122 Cal. 509, 55 Pac. 390 5

Brock v. *Superior Court*, 9 Cal. (2d) 291 5

Evans v. *Superior Court*, 14 Cal. (2d) 563 5

Fortenbury v. *Superior Court*, 104 Cal. Dec. 407, 106 P. (2d) 411 2

McClatchey v. *Superior Court*, 119 Cal. 413 4

Reclamation District v. *Superior Court*, 191 Cal. 672 5

State Board of Equalization v. *Superior Court*, 5 Cal. App. (2d) 374 5

Statute Cited.

Code of Civil Procedure of California, Section 964 4

SUPREME COURT OF THE UNITED STATES

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PETITIONERS' REPLY BRIEF ON PETITION FOR CERTIORARI.

I.

The Petition for Writ of Certiorari Filed by the Petitioners in the Supreme Court of California was the Appropriate Procedure, Under the Law and Practice of California, Properly, Adequately and Timely to Assert the Denial of Federal Due Process.

Despite early intimations by the California Courts to the contrary, the *present* law of California is that:

(a) A petition for writ to review a judgment of a California trial court is an appropriate remedy in the Supreme

Court of California, to review a judgment of a lower court, even though there is a right of appeal from said judgment; and

(b) A petition for review will lie where the judgment is either unauthorized or abridges constitutional right.

The latest decisions of the Supreme Court of California broaden widely the scope of the writ of review.

Thus in *Fortenbury* v. *Superior Court,* decided October 14, 1940, 104 Cal. Dec. 407, 106 P. (2d) 411, the California Supreme Court thus summarizes the present California law:*

> "The term jurisdiction (as affecting the scope of the writ of review) originally included only the right to hear and determine concerning the subject matter in a particular case. But the modern tendency has been to broaden that meaning, particularly where the right to review a decision by *certiorari* or other prerogative writ is the question for decision. A court may have jurisdiction of the cause of action and of the parties, but it may lack the authority or power to act in the case except in a particular way. Under such circumstances, it is now generally held that the court had no jurisdiction."

Similarly, in a decision even more recent than the above, the Supreme Court of California in *Abelleira* v. *District Court of Appeal* (Feb. 7, 1941), 2 Cal. Dec. 254, 109 P. (2d) 945, reviewed the present law of California and stated it to be that certiorari (or review) and prohibition will lie in the Supreme Court of California to annul a judgment of a lower California Court when that Court lacks jurisdiction to

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* Counsel for the petitioners in the case at bar were counsel for the petitioners in the *Fortenbury* case. Counsel for the respondent in the instant case were attorneys for the respondent in the *Fortenbury* case. The respondent in the instant case studiedly avoids any mention of the *Fortenbury* case in its brief in this Court.

make the particular order challenged. The Court declared: "In its ordinary usage the phrase 'lack of jurisdiction' is not limited to these fundamental situations" (where there is a complete absence of jurisdiction by a California trial court over the parties or subject matter).

> "For the purpose of determining the right to review by certiorari, restraint by prohibition, or dismissal of an action, a much broader meaning is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. * * *
>
> "On a number of occasions the courts of this State have recognized the conflicting senses in which the term 'jurisdiction' is used, and have emphasized the point that in applications for prohibition or certiorari, the broader meaning is involved. * * *
>
> "The foregoing observations, while by no means a complete description of the term, nevertheless, serve as a warning against a too restricted meaning. The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the *requirement of due process*,* some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional. Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*, are in excess of jurisdiction, insofar as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari."

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* Italics ours.

It seems clear therefore that where a judgment of a California trial court abridges due process, Federal or State, a writ of review will lie in the courts of California to challenge and annul such a judgment.

In accord, is an early decision of the California Supreme Court *McClatchey* v. *Superior Court,* 119 Cal. 413, 416, in which a judgment of a trial court was adjudged void because it abridged "a constitutional right (of a defendant) to be heard in his defense."

The filing by the petitioners, of a petition for a writ of review in the California Supreme Court, to set aside a judgment based upon an abridgment of Federal due process, was, accordingly, an appropriate procedure under California law.

Nor does the fact that there is a right of appeal, prevent an aggrieved litigant under California law and practice from challenging a judgment offending Federal due process, by a petition for writ of review.

Here, again, *Fortenbury* v. *Superior Court, supra,* unmentioned by the respondent in its brief, supports the above proposition. In the *Fortenbury* case the petitioner for a writ of review in the California Supreme Court had a right of appeal from the order of the California trial court complained of by the petitioner.

Section 964, *Code of Civil Procedure of California.*

An order for an injunction is an appealable order. The petitioner sought relief from a void order by a petition for a writ of review. The writ was ordered to issue by the California Supreme Court because the petitioner's constitutional rights to freedom of expression under the Federal Constitution had been abridged by the order entered in the trial court.

Other California cases in accord include *Evans* v. *Superior Court*, 14 Cal. (2d) 563, 580. The Supreme Court of California declared in that case:

> "Thus this remedy (of the writ of prohibition) has been invoked in numerous cases to prohibit further proceedings by the Superior Court directed toward the enforcement of the preliminary injunction previously issued by such court."

Under California practice, as indicated above, a preliminary injunction is an appealable order; the scope of the writ of prohibition and the writ of certiorari is identical.

Other California cases are:

Brock v. *Superior Court*, 9 Cal. (2d) 291;

Reclamation District v. *Superior Court*, 191 Cal. 672;

State Board of Equalization v. *Superior Court*, 5 Cal. App. (2d) 374, 379.

Moreover, under California law,

> "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds or bars anyone."
>
> *Freeman on Judgments*, Sec. 117 (cited in *Bennett* v. *Wilson*, 122 Cal. 509, 55 Pac. 390).

II.

The California Courts Never Have Adjudicated that Hamilton was Not Guilty of Fraudulent Representations. Respondent's Assertion that: "The Necessary Effect of the Final Judgment in Hamilton's Favor was that He Did Not Make Them" (the Fraudulent Representations) is Untrue.

The only issue determined by the California Courts, and hence the only issue actually adjudicated was that the petitioners did not make that thorough-going inspection of the

premises which would have resulted in a discovery by them that Hamilton had committed the fraud complained of. Indeed, the decision of the District Court of Appeals is founded upon the premise that Hamilton was *guilty* of the fraud charged.*

Moreover, the decision of the California Supreme Court in the foreclosure action (R. 47) determined in effect that in the damage action, the order for a new trial by the trial court is co-existent with the judgment notwithstanding the verdict ordered by the District Court of Appeals in the same action; the District Court of Appeals made said order for a new trial as to all the issues the basis for declaring the jury judgment in favor of the petitioners vacated and for dismissing Hamilton's appeal from said vacated judgment.

Clearly the order for a new trial as to all the issues, which vacated the judgment, vacated also all of the proceedings of the trial in the damage action.

The highest state court of California has ruled, in effect, that the judgment notwithstanding the verdict in favor of Hamilton in the damage action was entered in the vacated proceedings of the vacated trial and is, accordingly, not a judgment on the merits.

In the foreclosure action the California Supreme Court (R. 48, 49) summarily affirmed the abrogation of the fundamental principle of clean hands in equity, which is inherent in Federal and State due process; and is not a remedy but a self-imposed limitation of a court of equity, separate from the rights of either party.

Accordingly, the petitioners have been denied Federal due process, for which denial the only hope of relief now

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* This matter is discussed in the Petition for a Writ of Certiorari, pages 9 to 11; that discussion is accordingly not duplicated herein.

available to them lies in such solicitous consideration as they may receive by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 1940
No. 756.

MARGARET B. CARPENTER and LEROY E. CARPENTER,
Petitioners,

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX.

PAGE

I.

Preliminary Statement 1

II.

Jurisdiction 3

(1) No federal question properly raised in the state courts..... 3

(2) The writ of review did not lie..... 3

III.

Summary statement of reasons requiring denial of petition..... 7

(1) The attempted proceeding in the state court in which petitioners sought the writ of review was without jurisdiction, and constituted an attempt to invoke a remedy not available to petitioners under California practice..... 7

(2) No federal question was ever properly raised, claimed, presented or argued, either in the trial court or in the Supreme Court of California..... 7

(3) Neither the Superior Court nor the Supreme Court of California was ever called upon to consider or pass upon any question of federal constitutional right, since petitioners' only attempt to raise a federal question was by way of a petition which did not lie under California practice 8

(4) No federal question is presented because the application of the doctrine of res judicata is purely a matter of local law 8

(5) The question presented is unsubstantial and frivolous..... 9

(6) The case presented is not one involving a matter of such public or general importance as to warrant granting the discretionary writ 9

PAGE

IV.

Argument 10

(1) The claim of error asserted by petitioners is unsubstantial and unmeritorious in that: (a) the application of the doctrine of res judicata is exclusively a matter of local law, and (b) petitioners' own statement of the case discloses that no denial of due process was involved in any of the proceedings or rulings of the California courts..... 10

V.

Conclusion 13

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Adams v. Louisiana Board of Liquidation, 144 U. S. 651, 36 L. Ed. 578	8
Anglo Californian Bank v. Superior Court, 153 Cal. 753, 96 Pac. 803	4
Beals v. Cone, 188 U. S. 184, 47 L. Ed. 435	8
Carpenter v. Hamilton, 18 Cal. App. (2d) 69, 62 Pac. (2d) 1397	11, 12
Coan v. Superior Court, 14 Cal. (2d) 591, 95 Pac. (2d) 931	4, 7
Chandler v. Manifold, 290 U. S. 665, 78 L. Ed. 575	8
Chicago etc. Ry. Co. v. McGuire, 196 U. S. 128, 49 L. Ed. 413	8
Christie v. Superior Court, 218 Cal. 423, 23 Pac. (2d) 757	4, 7
Consolidated Turn Pike Co. v. Norfolk & Ocean View Ry. Co., 228 U. S. 596, 57 L. Ed. 982	9
Equitable Life Assurance Society v. Brown, 187 U. S. 308, 47 L. Ed. 190	9
Haley v. Breeze, 144 U. S. 130, 36 L. Ed. 373	8
Herndon v. Georgia, 295 U. S. 441	5
Herndon v. Lowry, 301 U. S. 242	5, 6
Hildebrand v. Superior Court, 173 Cal. 86, 159 Pac. 147	4
Ivory v. Superior Court, 12 Cal. (2d) 455, 85 Pac. (2d) 894	4, 5, 7
King v. West Virginia, 216 U. S. 92, 54 L. Ed. 396	9
Layne & Bowler Corporation v. Western Well Works, Inc., 261 U. S. 387, 67 L. Ed. 712	9
Missouri Pacific Ry. Co. v. Hanna, 266 U. S. 184, 69 L. Ed. 235	8
Mutual Life Ins. Co. of New York v. McGrew, 188 U. S. 291, 47 L. Ed. 480	7

PAGE

New York Central etc. R. R. Co. v. City of New York, 186 U. S. 269, 46 L. Ed. 1158 7

Northern Pacific R. R. Co. v. Ellis, 144 U. S. 458, 36 L. Ed. 504 8

Postal Telegraph Cable Co. v. Newport, 247 U. S. 464, 62 L. Ed. 1215 9

San Francisco v. Itsell, 133 U. S. 65, 33 L. Ed. 570 ..... 8, 10

Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, 59 L. Ed. 777 9

State Board of Equalization v. Superior Court, 9 Cal. (2d) 252, 70 Pac. (2d) 482 ..... 4, 7

Stoddard v. Superior Court, 108 Cal. 303, 41 Pac. 278 ..... 5, 7

Todhunter v. Smith, 219 Cal. 690, 28 Pac. (2d) 916 11

Western Electrical Supply Co. v. Abbeville Electric Light & Power Co., 197 U. S. 299, 49 L. Ed. 765 9

STATUTES.

Code of Civil Procedure, Sec. 1068 ..... 3, 5, 7

TEXTBOOKS.

2 Freeman on Judgments, 5th Ed., p. 1443 12

IN THE

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Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Preliminary Statement.

Respondent views the institution of the present proceeding as a wholly unwarrantable abuse of the processes of this Court. In *Carpenter v. Hamilton,* October Term, 1940, No. 93, petitioners urged upon this Court precisely the same arguments which are again offered in support of the present petition. The petition in No. 93 was denied by this Court on October 21, 1940, without opinion.

Prior to filing their petition in No. 93 petitioners had availed themselves of the remedy of appeal to the Supreme Court of California, and that appeal had resulted in an affirmance of the judgment of which petitioners complain. *After* this Court had denied their petition in No. 93 petitioners filed in the Supreme Court of California a petition for writ of review. In the latter petition the Supreme Court of California was asked again to review the very same judgment which it previously had reviewed and affirmed on petitioners' appeal. The Court refused to entertain the proceeding, denying the petition without opinion.

Under California practice, as we shall show, it is well settled that the writ of review does not lie in any case where the judgment or order complained of is reviewable on appeal. On its face, therefore, the petition for writ of review was a sham and a pretense. Quite obviously it was filed only in an attempt to lend color to a false claim that a federal question had been appropriately raised in the California courts and in the hope of creating a deceptive illusion of foundation for the present petition in this Court.

II.

Jurisdiction.

(1) No Federal Question Properly Raised in the State Courts.

Petitioners cannot, and do not, assert that any federal question was ever raised or suggested by them in the California courts otherwise than by the filing of said petition for writ of review. During the trial of the case in the Superior Court "due process" was not so much as mentioned. There was not the slightest hint or intimation that the existence of a federal question was claimed. Likewise, in the briefs filed in the Supreme Court of California on the appeal there was not the remotest suggestion of a federal question. After the affirmance of the judgment by the Supreme Court of California petitioners filed a petition for a rehearing, but even then there was no claim or suggestion of a federal question. Never, until the petition for a writ of review was filed, did petitioners assert the existence of a federal question in a California court.

(2) The Writ of Review Did Not Lie.

It is too clear to admit of reasonable argument that the judgment of which petitioners complain could not be reviewed by the Supreme Court of California on petition for writ of review. It was reviewable upon appeal, and in no other way. It *had* been thus reviewed and affirmed upon petitioners' own appeal. Section 1068 of the Code of Civil Procedure of the State of California is the con-

trolling statutory provision which determines the circumstances under which the writ of review (certiorari) may be granted. Said section provides as follows:

> *"When and by what courts granted.* A writ of review may be granted by any court, except a municipal, police or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, *and there is no appeal,* nor, in the judgment of the court, any plain, speedy, and adequate remedy." (Italics supplied.)

Innumerable times the Supreme Court of California has held that the above-quoted statutory provision means precisely what it says, namely, that the writ of review may not be granted to review an appealable order or judgment. Moreover, this rule is equally applicable in cases where it is asserted that the order or judgment complained of was without the jurisdiction of the court making it. The following are only a few of the vast number of decisions so holding:

Coan v. Superior Court, 14 Cal. (2d) 591, 95 Pac. (2d) 931;

Ivory v. Superior Court, 12 Cal. (2d) 455, 85 Pac. (2d) 894;

State Board of Equalization v. Superior Court, 9 Cal. (2d) 252, 70 Pac. (2d) 482;

Christie v. Superior Court, 218 Cal. 423, 23 Pac. (2d) 757;

Hildebrand v. Superior Court, 173 Cal. 86, 159 Pac. 147;

Anglo Californian Bank v. Superior Court, 153 Cal. 753, 96 Pac. 803.

In *Ivory v. Superior Court, supra,* the California Supreme Court stated the law as follows:

> "It is the general rule that 'where the law allows an appeal from an order or judgment, even when the tribunal making such order or rendering such judgment exceeded its authority in so doing, a writ of review may not be granted'." (Citing Code of Civil Procedure, Section 1068, and many cases.)

In *Stoddard v. Superior Court,* 108 Cal. 303, 41 Pac. 278, the California court said:

> "It may be readily admitted that the court had no jurisdiction to make the order; but, as the order is appealable, certiorari will not lie, because it lies only where 'there is no appeal.' (Code Civ. Proc., Sec. 1068.) * * * In *Stuttmeister v. Superior Court,* 71 Cal. 322, the authorities on the point are colated; and it was there declared that 'the writ (certiorari) will not lie when there is an appeal from the action complained of,' and 'the writ is not given in lieu of an appeal, but only to review errors in excess of jurisdiction *for which an appeal does not lie.*' (See cases cited in opinion of Searls, C., also *In re McConnell,* 74 Cal. 217, 219; Hayne on New Trial and Appeal, Sec. 307.) We have been referred to no case in which it has been held that, under our code, a writ of certiorari will lie to reverse an appealable order."

Petitioners assert that the history of the present litigation "is not unlike" that involved in *Herndon v. Georgia,* 295 U. S. 441, and *Herndon v. Lowry,* 301 U. S. 242. The falsity of the assertion is apparent. In the *Herndon* case the Georgia courts considered and specifically disposed of the federal questions which were raised in the

habeas corpus proceeding. It is to be assumed, and this Court *did* assume in *Herndon v. Lowry*, that the *habeas corpus* proceeding, under the state law, was a proper proceeding in which the issues of federal constitutional right were appropriately raised. This Court, speaking through Mr. Justice Roberts, made the following observation in this connection:

> "In the present proceeding the Superior Court and Supreme Court of Georgia have considered and disposed of the contentions based upon the federal Constitution. The scope of a *habeas corpus* proceeding in the circumstances disclosed is a state and not a federal question and since the state courts treated the proceeding as properly raising issues of federal constitutional right, we have jurisdiction and all such issues are open here."

In the *Herndon* case the Superior Court and the Supreme Court of Georgia not only entertained the *habeas corpus* proceeding, but they considered and disposed of the contentions based upon the federal Constitution. In the present case, on the contrary, it is abundantly clear that the writ of review did not lie. The California Supreme Court *refused* to entertain the proceeding, and *declined* to consider or pass upon the federal question, or any other question. It is clear that the California Supreme Court had no jurisdiction to entertain the proceeding. When petitioners had exercised their right of appeal and when their petition for a rehearing had been denied by the California Supreme Court they had exhausted the last remedy available under the law of California.

III.

Summary Statement of Reasons Requiring Denial of Petition.

(1) THE ATTEMPTED PROCEEDING IN THE STATE COURT IN WHICH PETITIONERS SOUGHT THE WRIT OF REVIEW WAS WITHOUT JURISDICTION, AND CONSTITUTED AN ATTEMPT TO INVOKE A REMEDY NOT AVAILABLE TO PETITIONERS UNDER CALIFORNIA PRACTICE.

Code of Civil Procedure, State of California, Sec. 1068;

Coan v. Superior Court, 14 Cal. (2d) 591, 95 Pac. (2d) 931;

Ivory v. Superior Court, 12 Cal. (2d) 455, 85 Pac. (2d) 894;

State Board of Equalization v. Superior Court, 9 Cal. (2d) 252, 70 Pac. (2d) 482;

Christie v. Superior Court, 218 Cal. 423, 23 Pac. (2d) 757;

Stoddard v. Superior Court, 108 Cal. 303, 41 Pac. 278.

(2) NO FEDERAL QUESTION WAS EVER PROPERLY RAISED, CLAIMED, PRESENTED OR ARGUED, EITHER IN THE TRIAL COURT OR IN THE SUPREME COURT OF CALIFORNIA.

New York Central etc. R. R. Co. v. City of New York, 186 U. S. 269, 46 L. Ed. 1158;

Mutual Life Ins. Co. of New York v. McGrew, 188 U. S. 291, 47 L. Ed. 480;

Chicago etc. Ry. Co. v. McGuire, 196 U. S. 128, 49 L. Ed. 413;

Missouri Pacific Ry. Co. v. Hanna, 266 U. S. 184, 69 L. Ed. 235;

Chandler v. Manifold, 290 U. S. 665, 78 L. Ed. 575.

(3) NEITHER THE SUPERIOR COURT NOR THE SUPREME COURT OF CALIFORNIA WAS EVER CALLED UPON TO CONSIDER OR PASS UPON ANY QUESTION OF FEDERAL CONSTITUTIONAL RIGHT, SINCE PETITIONERS' ONLY ATTEMPT TO RAISE A FEDERAL QUESTION WAS BY WAY OF A PETITION WHICH DID NOT LIE UNDER CALIFORNIA PRACTICE.

See cases cited under (1) and (2), *supra.*

(4) NO FEDERAL QUESTION IS PRESENTED BECAUSE THE APPLICATION OF THE DOCTRINE OF RES JUDICATA IS PURELY A MATTER OF LOCAL LAW.

Northern Pacific R. R. Co. v. Ellis, 144 U. S. 458, 464, 36 L. Ed. 504;

Haley v. Breeze, 144 U. S. 130, 131, 132, 36 L. Ed. 373;

San Francisco v. Itsell, 133 U. S. 65, 33 L. Ed. 570;

Adams v. Louisiana Board of Liquidation, 144 U. S. 651, 36 L. Ed. 578;

Beals v. Cone, 188 U. S. 184, 47 L. Ed. 435;

Western Electrical Supply Co. v. Abbeville Electric Light & Power Co., 197 U. S. 299, 49 L. Ed. 765;

King v. West Virginia, 216 U. S. 92, 54 L. Ed. 396;

Postal Telegraph Cable Co. v. Newport, 247 U. S. 464, 62 L. Ed. 1215.

(5) THE QUESTION PRESENTED IS UNSUBSTANTIAL AND FRIVOLOUS.

Consolidated Turn Pike Co. v. Norfolk & Ocean View Ry. Co., 228 U. S. 596, 57 L. Ed. 982;

Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, 59 L. Ed. 777;

Equitable Life Assurance Society v. Brown, 187 U. S. 308, 47 L. Ed. 190.

(6) THE CASE PRESENTED IS NOT ONE INVOLVING A MATTER OF SUCH PUBLIC OR GENERAL IMPORTANCE AS TO WARRANT GRANTING THE DISCRETIONARY WRIT.

Layne & Bowler Corporation v. Western Well Works, Inc., 261 U. S. 387, 67 L. Ed. 712.

IV.
Argument.

(1) THE CLAIM OF ERROR ASSERTED BY PETITIONERS IS UNSUBSTANTIAL AND UNMERITORIOUS IN THAT: (A) THE APPLICATION OF THE DOCTRINE OF RES JUDICATA IS EXCLUSIVELY A MATTER OF LOCAL LAW, AND (B) PETITIONERS' OWN STATEMENT OF THE CASE DISCLOSES THAT NO DENIAL OF DUE PROCESS WAS INVOLVED IN ANY OF THE PROCEEDINGS OR RULINGS OF THE CALIFORNIA COURTS.

The decisions of this Court, cited *supra*, demonstrate that the application of the doctrine of *res judicata* is a matter of purely local law. Clearly, the application of the local law was independently sufficient to sustain the judgment. In *San Francisco v. Itsell*, 133 U. S. 65, this Court, speaking through Mr. Justice Gray, used the following language with reference to a judgment of the Supreme Court of California:

> "In the present case, the record of the pleadings, findings of fact and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the case and copied in the record shows that it did not decide, any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action. That was a question of general law only, in nowise depending upon the Constitution, treaties or statutes of the United States. *Chouteau v. Gibson*, 111 U. S. 200 (28:400).
>
> *Writ of error dismissed for want of jurisdiction.*"

Likewise, in the instant case, the record shows that the sole question involved was whether or not petitioners were estopped by the judgment in the former action from

asserting that Hamilton was guilty of fraudulent misrepresentations. It must be quite apparent that the California courts decided this question correctly, because it is established by the decisions, to which the California Supreme Court referred, that the essential elements of actionable fraud are precisely the same both in law and in equity. Furthermore, said California decisions establish the proposition that a final judgment upon the merits is forever conclusive upon the parties with respect to every material issue of *fact* tendered in the litigation in which the judgment was rendered. (*Todhunter v. Smith*, 219 Cal. 690, 28 Pac. (2d) 916.) Therefore, the California Supreme Court correctly said that there was no place for the application of the maxim that "he who comes into equity must come with clean hands."

Petitioners seek to make it appear that they were "robbed" by the California courts of the "right to a hearing" upon their allegations that they were defrauded. Nothing could be more untrue. Petitioners, themselves, instituted the original action, in which they sought to recover damages by reason of the alleged fraud. That action was regularly tried. It terminated in a judgment adverse to petitioners. (*Carpenter v. Hamilton*, 18 Cal. App. (2d) 69, 62 Pac. (2d) 1397.) The necessary effect of the judgment in the fraud case was a conclusive determination that no fraud had been practiced upon the petitioners.

Actually, petitioners' complaint is that they were not permitted to have two separate trials upon their claim that they were defrauded. Their position is that they should have been permitted to retry the fraud issues in the foreclosure case, exactly as though the fraud case had never been tried or decided. Such procedure, we submit,

would not be countenanced anywhere. Unless judgments are, at some point, accorded the attribute of finality litigation must necessarily remain interminable.

Clearly, the ruling of the Superior Court in the foreclosure case, and the decision of the Supreme Court sustaining that ruling, were correct applications of the doctrine of *res judicata*. Not only was the ruling in accord with well-established California law, but it harmonizes with the salutary doctrine of *res judicata* as this principle of law is almost universally understood and applied. The text writer in 2 *Freeman on Judgments*, 5th edition, page 1443, states the law as follows:

> "By the rules of the civil as well as of the common law, '*res judicata* is not changed by a change in the form of action.' It is not material that the form of action be the same, if the merits were tried in the first. A party cannot, by varying the form of action or adopting a different method of presenting his case, escape the operation of the principle that one and the same cause of action shall not be twice litigated. Where either of two remedies is equally available to vindicate the same right, the judgment in an action employing one of them will bar a resort to the other."

It is elementary that a final judgment on the merits concludes every issue of law and fact tendered in the action as between the parties thereto. One of the issues of fact tendered in *Carpenter v. Hamilton* was whether or not Hamilton made the misrepresentations as alleged. The necessary effect of the final judgment in Hamilton's favor was a determination that he did not make them. When that judgment became final the Carpenters were forever estopped from asserting that Hamilton was guilty of misrepresentation.

V.

Conclusion.

Respondent feels that the lack of merit in the present petition is so obvious as to render superfluous any extended argument. We do not believe that counsel for petitioners can, with candor or in good faith, represent to this Honorable Court that the writ of review sought in the Supreme Court of California was a remedy available to petitioners under California law. Yet denial of said writ is the asserted basis for the petition herein.

The record here, obviously insufficient though it is, does reveal that the novel idea that a federal question might be claimed was not conceived in the minds of petitioners' counsel until after every remedy known to California law had been completely exhausted by them.

Quite aside from the clear absence of elementary jurisdictional requirements, the contentions sought to be presented by petitioners, we submit, are patently unsubstantial and frivolous.

Respectfully submitted,

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Of Counsel:

J. H. O'Connor,
County Counsel;

Douglass DeCoster,
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Due service of the within Brief is hereby acknowledged this.....day of March, A. D. 1941.

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Attorneys for Petitioners.

3-10-41—60